Petition

81-1280

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

ROBERT DUMAS, Petitioner

VS.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit can sanction a trial judge from dismissing a chosen and fit juror from a criminal case, because of a conflict with the trial setting, and a juror's work schedule; particularly, when that excuse, in the form of an unauthenticated letter, is accepted on the Court's own initiative, over the objection of the defendant, and without any verification by the juror himself.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Robert Dumas, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on October 8, 1981.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix 2 infra, p.13) is reported in F2d

JURISDICTION

The judgment of the Court below (Appendix 2, infra, p. 13) was entered on October 8, 1981. Rehearing was denied on November 6, 1981. The jurisdiction of this Court is invoked under 28 U.S. C. Sec 1254 (1).

QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit can sanction a trial judge from dismissing a chosen and fit juror from a criminal case, because of a conflict with the trial setting, and a juror's work schedule; particularly, when that excuse, in the form of an unauthenticated letter, is accepted on the Court's own initiative, over the objection of the defendant, and without any verification by the juror himself.

CONSTITUTIONAL PROVISIONS AND STATUTES ENVOKED

1. The Sixth Amendment, The United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime should have been committed, which district shall have been previously assertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses in his favor, and to have the assistance of counsel in his defense.

2. Rule 24 (c) Fed. Rules of Criminal Procedure.

(c) Alternate Jurors. The Court may direct that not more than 6 jurors in addition to the regular jury be called and

impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

3. Rule 43 (a) Fed. Rules of Criminal

Procedure.

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

4. Title 21 Section 841 U.S.C.

(a) Except as authorized by this title, it should be unlawful for any person knowingly or intentionally---

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intention to dispense a counterfeit substance.

STATEMENT OF CASE

On June 12, 1980, after the jury had been chosen by both sides, and some twenty days before the trial was to begin, the trial judge on his own authority released and excused juror number five from any further participation in the case. The judge made no findings of fact that the juror was unable to serve or was disqualified, in fact the only evidence of why he

was excused, is a letter, the contents of which was read into the record. (Appendix I)

The defendant's attorney duly and timely objected to the excuse of the juror and perfecred his error to the Fifth Circuit Court of Appeals. Whereon October 8, 1981, the judgment was affirmed.

REASON FOR GRANTING THE WRIT

The Fifth Circuit in deciding the present case in this manner has set a precedent which would effectively abolish our jury system. In the present case, a juror was dismissed from the trial of a criminal case, only on the basis of a letter, abstensively from the juror's employer. There was no hearing held under Rule 43(a) to determine whether the excuse was valid or even to test the authenticity of the letter, no other form of evidence was intorduced to explain or give some factual basis for the Judge's action, and no pending emergency required a departure from the rules of evidence.

Two Federal Rules of Procedure are intertwined in this case, Rule 24(c) and Rule 43(a). Since both of these rules help preserve the integraty of the Sixth Amendment to the United States Constitu-

tion, there is a very serious constitutional issue involved. The problem put in its simplist terms is when does the need of an employer to have his employee on the job take priority over that employee serving on a criminal jury after he has been chosen by both sides? If the present case is allowed to stand, the answer is that the employer only has to write a letter to the judge saying that his employee is urgently needed and he will be excused from jury service.

Now, Rule 24(c) concerns the replacement of jurors with alternates when the original jurors become or are found to be unable or disqualified to perform their duties. This rule has been clarified by case decision to mean that "the trial judge, in his sound discretion, may remove a juror and replace him with an alternate juror whenever facts are presented which convince the trial judge that the juror's ability to perform his duty as a juror is impaired. United States v Rodriguez (CA 5 1978) 573 F2d 330; United States v Smith (CA 5 1977) 550 F2d 277; United States v Cameron (CA 3 1972) 464 F2d 333.

However, the reason in the present case does not suggest that there is anything

wrong with the juror. It is simply a conflict in scheduling, i.e., on the date he was supposed to serve as a juror, he was also needed on his job. And, while the letter-excuse states by conclusion that he is urgently needed, it is ambiguous as to the importance of the work and the need for it to be done at this particular time. Why, for instance, could not the juror have been sent four days earlier (the date of the letter) and been back in time for the first day of trial. In fact, since the letter only states that the juror will return "approximately" 04 July 1980, and since the trial started 02 July 1980, it is very possible that the work could have been completed before schedule and the juror available on the day the letter was read.

But far more important than the abiguity of the letter, is the basis of the request. In essence, it asks that a juror be excused because he is more urgently needed elsewhere, therefore, the real question is what kind of work is so important that it must take priority over sitting as a juror. The answer should be apparent, for as we elevate each job above the duty to serve as a juror, we whittle away at the Sixth

Amendment safegurard; that a man has a right to be tried by a jury of his peers. And this is especially true after the juror has been selected from the venire panel.

This is especially ironic in the instant case since the employer is the United States Army, for if we allowed jurors to be removed from public trials in the name of defense, what are we defending.

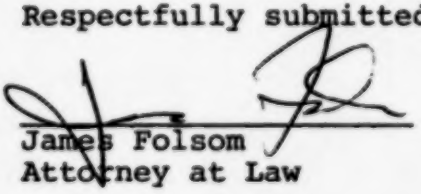
Rule 43(a) compliments Rule 24(c) by making it a requirement that the defendant be present when a juror is found unfit. Howerver, since this Rule was completely ignored (note, there was plenty of time to contact all the parties since the excuse was granted long before the trial commenced) no record was made to support the judge's actions.

Therefore, the only thing we can argue about is an unsworn letter. No witness was interrogated about how urgent the "job" actually was. In fact, since the rules of evidence were ignored, there is no sponsor to attack veracity to the letter, and there is nothing to prove that it was not a complete forgery. Even the juror was ignored in this unilateral decision, so that even

with the letter we don't know whether the juror thought his job was more important, whether he wanted to serve, or how he felt about being excused.

If we make it this simple for employers to free the employees from serving as jurors, not only will we open a floodgate of letter-excuses, we will invite abuse. Say for instance in a case identical to this, that the Government for one reason or another had exhausted their peremptory challenges but they still did not want juror number five, all they would have to do is call their buddy over in defense, have him write a letter and presto the juror is gone. If that sounds too absurd, remember there is not a shred of evidence to prove it did not happen in this case.

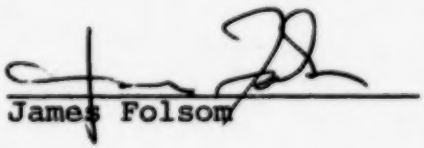
Respectfully submitted,



James Folsom
Attorney at Law

CERTIFICATE OF SERVICE

I, James Folsom, hereby certify that a true and correct copy of Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to the Solicitor General, Department of Justice, Washington, D. C., 20530, on this the 5 day of December, 1981, by Certified Mail, Return Receipt Requested.



James Folsom

DEPARTMENT OF THE ARMY
CORPUS CHRISTI ARMY DEPOT
CORPUS CHRISTI, TEXAS 78419

SDSCC-MASS

11 Jun 80

SUBJECT: Release From Jury Duty

To whom it may concern:

Mr. Tomas A. Trujillo is scheduled to go to Norton Air Force Base in San Bernadino, California on 15 June 1980 and return approximately 04 July 1980. He is urgently needed to help inspect and repair approximately 200 fuel cells and there is no replacement for him.

Request Mr. Trujillo be released from jury duty until after his return from this mission. We regret any inconvenience this may cause you.

Thank you for your cooperation.

Floyd J. Richards

FLOYD J. RICHARDS
Foreman, Shop 5DC3D

William M. Budjick

WILLIAM M. BUDJICK
Chief, Structural Support Section

Appendix 1

FORMER FIFTH
UNITED STATES V. DUMAS

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robet DUMAS, Defendant-Appellant.

No. 80-1942

Summary Calendar.

United States Court of Appeals,
Fifth Circuit
Unit A

Oct. 8, 1981

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Defendant Robert Dumas (Dumas) raises seven issues for this Court's review challenging his conviction by a jury for both possession with intent to distribute methamphetamine and distribution of same. A five year sentence was imposed with a three year special parole term on each count to run concurrently.

In November 1979, a paid informant for the Drug Enforcement Administration (DEA) met Dumas in a bar in Corpus Christi, Texas. On February 12, 1980, this informant telephoned Dumas at his place of employment

and inquired about the possibility of purchasing some methamphetamine. The two agreed to meet, and at the subsequent meeting the paid informant agreed to purchase a gram of methamphetamine from Dumas. Later that night, the informant and a Special Agent for the DEA met Dumas at his apartment and paid him $85.00. Dumas left his apartment and returned thirty minutes later with the gram of methamphetamine.

Dumas argued at trial that he was entrapped, and maintained that he only sold the methamphetamine to get rid of the informant and because he felt obligated to the informant who had given him some methamphetamine a few days before. The defense included the testimony of a psychologist who categorized the informan as a "father-figure" who had obligated Dumas by giving him narcotics.

Following our consideration of Dumas' appeal, we affirm his conviction.

Dismissing A Juror

After the jury had been selected, but before they were sworn, the District Court released a juror and replaced him without notifying the parties. The juror's employer, the U.S. Army, wrote a letter to the District Court requesting that the

juror be excused because he was scheduled to be out of town on the day the trial was to commence. The letter recited that the juror was urgently needed to perform a fuel inspection at a U.S. Air Force base in California. On the morning of trial, defense counsel, on learning of this for the first time, objected to the replacement of the juror, moved for a mistrial, and asked that another jury be picked. The District Court replaced the juror with an approved alternate and overruled the objection.

Dumas first complains that the juror was neither unable to perform his duties nor was he disqualified. SEE F.R.Crim.P. 24(c). He alleges an abuse of discretion by the District Court in excusing the juror for a mere conflict in employment scheduling. More specifically, Dumas doubts the urgency of the juror's job as compared with the urgency of a criminal trial.

(1-4) In this Circuit, it is within the trial judge's sound discretion to remove a juror and replace him with an alternate whenever that juror's ability to perform his duties becomes impaired. U.S. v. DOMINGUEZ, 615 F.2d 1093, 1095 (5th Cir. 1980). Absent a showing of bias or prej-

udice to the defendant, the trial court's exercise of that discretion is not to be disturbed. U.S. v. RODRIGUEZ, 573 F.2d 330 (5th Cir. 1978) VACATING 564 F.2d 1189 (5th Cir. 1977). Factual support or a legally relevant reason must exist for such a dismissal of a juror. Id. at 332. In the present case, the District Court was clearly satisfied that the juror who was dismissed was urgently needed by his employer and unable to serve under the terms of Rule 24(c), supra. We find no abuse of discretion in that determination. Contrary to Dumas' argument, this finding does not open the flood gates for any juror to elevate employment responsibilities above the duty to serve as a juror. Trial judges must carefully consider the excusal of any juror, and excusals for insubstantial reasons would not be tolerated.

Complaint is also made that the juror was excused without prior notification of and consultation with defense counsel. Relying on F.R.Crim.P. 43(a), which requires that a defendant be present "at every stage of the trial including the empaneling of the jury...," Dumas contends that the dismissal of the above juror was not justified by any immediate necessity

or emergency, and he was thus denied the opportunity to test the factual basis as well as the validity of the reason for the dismissal.

> This Court in DOMINGUEZ, supra, stated: It is clear from the record that it was by inadvertence and not design that defense counsel was not present when the determination of whether the juror should be excused was made. While it is clearly the better practice to have defense present when such an excusal is granted, the trial judge's misunderstanding about the status of this particular juror does not merit reversal of appellant's conviction in this case.

615 F.2d at 1096. In DOMINGUEZ, the trial judge mistakenly excused a seated juror under the impression that the juror was not seated. Despite this error, this Court held that the trial judge's determination of inability to serve was not frivolous and therefore was not an abuse of discretion. Because a full explanation of the circumstances surrounding the excusal was given by the trial judge, a record was created for review of the appropriateness of the Court's action and of any prejudice that might have resulted. 615 F.2d at 1096

n. 5.

(5) We are in agreement with the Second, Seventh and Tenth Circuits that a deprivation of the right to defendant's presence under Rule 43 is subject to the harmless error rule. See, e. g., U. S. v. SCHOR, 418 F.2d 26, 30 (2d Cir. 1969); WARE v. U. S., 376 F.2d 717, 791 (7th Cir. 1967); BACINO v. U. S., 316 F.2d 11, 14 (10th Cir.), cert. denied, 375 U.S. 831, 84 S.Ct. 76, 11 L.Ed.2d 63 (1963). We do not feel that the trial judge's determination of the juror's inability to serve, even though that determination was unwisely made outside of the presence of defense counsel, merits the reversal of the conviction. The record reveals that Dumas' objection at trial to the excusal was not based on the denial of notice or presence at the conference. Consequently, the District Court did not give reasons for the non-notification or for the failure to have the defendant present at the conference. Even if this issue is properly before this Court, the record indicates that it was by inadvertence, not design, that Dumas was not notified or present at the conference when the excusal was granted, and the error was harmless beyond a reasonable doubt.

Limits On Cross-Examination

There is nothing to the claim that the Court unduly limited cross-examination of the informant by sustaining the prosecutor's objection to a repetive question. Indeed, the record shows that defense counsel, in spite of the sustained objection, was able to ask the same question of the informant on another occasion during cross-examination. The question was actually asked on four occasions, and answered negatively without objection by the Government twice.

Proof Of An Extraneous Offense

(6) During cross-examination of the Government's informant, defense counsel asked the informant about a telephone conversation with Dumas. The informant replied that Dumas said,"(My attorney) is my God right now and he told me not to sell any more dope until after a prior case had been settled in court." During direct examination of Dumas, he testified that the statements made to the informant were merely fictitious and an attempt to stop the informant from bothering him. On cross-examination, Government counsel asked if it was also fictitious that Dumas had charges pending against him, and Dumas replied

that the entire story was fictitious. Defense counsel immediately objected to the question regarding an offense, and added that the prosecutor had "previously stated that he would not go into such things on cross-examination or otherwise and we don't believe that we have opened the door on anything." After hearing argument the District Court found that when defense counsel elicited the testimony concerning the pending charge against Dumas,[1] the door was opened to this line of testimony. See U.S. v. WALKER, 613 F.2d 1349, 1352-53, 1353 n. 5(5th Cir.), cert. denied, 446 U.S. 944, 100 S.Ct. 2172, 64 L.Ed2d 800 (1980). We find that the Government's questions were clearly permissible to impeach Dumas.

1. On direct examination of Dumas, when asked about a conversation with the informant, Dumas replied that "I made up a fictitious story that-I said my lawyer had been down at the building and that they had been following me all night...and I couldn't afford to do anything that would get me in trouble and I just made up the story so he wouldn't harass or bother me anymore."

An Improper Question?

(7) Following the line of testimony regarding charges pending against Dumas, the prosecutor asked, "Do you know that your father and (an attorney) came to my office yesterday and tried to get me to dismiss these charges against you?" Defense counsel objected to the question as irrelevant and immaterial, and requested that a mistrial be granted because this "is something that cannot be washed from the minds of the jury." The District Court denied the motion for mistrial and instructed the jury to disregard the "testimony of the United States Attorney that has been made in open court." Dumas now argues that the prosecutor's expression of personal opinion, because of his status and role as a spolesman for the Government, tended to tip the scales of justice in favor of the Government.

This was not an expression of opinion, but a direct question about the fact known to the prosecutor. Whether it should have been asked we need not decide, since the Judge's instructions were immediate and adequate.

The Prosecution's final Argument

We find no error, and certainly no plain or harmful error, in the prosecutor's final argument to which no objection was made. It was a permissible response to the defense's argument. U.S. v. COTTON, 631 F.2d 63, 66 (5th Cir. 1980), cert. denied,---U.S.---, 101 S.Ct. 1743, 68 L.Ed.2d 227 (1981), allows the Government to rebut defense counsel's arguments in strong terms where necessary to challenge an equally strong argument. Moreover, this Court must consider possible prosecutorial misconduct in light of the entire trial. See COBB v. WAINWRIGHT, 609 F.2d 754, 755 (5th Cir. 1980), cert. denied, 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 857 (1980). The error here, if any, was harmless in light of the entire record.

Jury Instructions On Entrapment

(8) The entire defense was entrapment by the Government informant. Dumas contends that the District Court's instruction on entrapment was vague and confusing. Specifically, Dumas argues that the use of the words "law enforcement officers or their agents" was not sufficiently precise so as to clear up any confusion that the jurors may have had as to whether the Dis-

trict Court meant Government agents or agents of Government Agents. Dumas made no request at trial for a more precise instruction that defense counsel proposed simply defined entrapment as being "induced or persuaded by law enforcement officers or their agents to commit the crime charged in the indictment," thus his requested charge was almost indentical in this respect to the District Court's.

We find no error in the entrapment instruction given to the jury in this case. The informant was often referred to as an agent during trial, and Dumas' defense was partially based on the fact that the informant was a paid Government employee.[2]

Maximum Sentence Imposed

(9) There is no error in the imposition of the maximum five year sentence which was within the statutorily permissible limits of 21 U.S.C.§ 841(a)(1). No objection was made to the pre-sentence re-

2. The present facts are clearly distinguishable form those in U.S. v. ANDERTON, 629 F.2d 1044 (5th Cir. 1980), where the "agent" who allegedly entrapped was simply an unpaid, "ignorant pawn" of the Government.

port, and the District Court was permitted to consider evidence of crimes for which Dumas had been indicted but not convicted. U.S. v. BENTON, 637 F.2d 1052, 1060 (5th Cir. 1981). We find no abuse of discretion here.

AFFIRMED.